IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 2ND JANUARY 2007 / 12TH PAUSHA 1928

AS.No. 427 of 1994(B)

OS.696/1991 of PRL.SUB COURT,KOTTAYAM
.....

APPELLANT:

K.J.JOSEPH,
KARUKAKULAM HOUSE,
MITHRAKARI KARA,
MUTTAR VILLAGE,
CHANGANACHERRY.

BY ADV. SRI.K.JAGADEESACHANDRAN NAIR
SRI.V.M.ARUN

RESPONDENTS:

1. THE MANAGER,
NEW INDIA ASSURANCE COMPANY LTD.,
PADINJAREKKARA CHAMBERS,
K.K.ROAD,
KOTTAYAM.

2. THE STATE BANK OF TRAVANCORE,
REPRESENTED BY THE MANAGER,
THURUTHY BRANCH,
CHANGANACHERRY.

BY ADV. SRI.K.P.SREEKUMAR,S.GOPINATH,MANU JOSEPH
SRI.JOSEPH A.VAKAKKEL,GEORGE K.VARGHESE
SRI.M.A.GEORGE

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 02/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO.2610/1994 IN A.S.No.427 of 1994

// DISMISSED//

02.01.2007 SD/- THOTTATHIL B RADHAKRISHNAN,JUDGE

/TRUE COPY/

P.A.TO JUDGE

THOTTATHIL B. RADHAKRISHNAN, J

A.S. No.427 Of 1994 &

C.M.P.No.2609 of 1994

Dated this the 2nd day of January, 2007.

J U D G M E N T

This appeal is by the plaintiff in a suit for money.

2. The plaintiff, the proprietor of the Small Scale Industrial Unit having a quick lime project, allegedly lost raw materials, finished products and the entire industry, attributed to be the result of heavy rain and storm and resulted collapsing of the factory. He had availed a loan from the 2nd defendant bank for the purpose of that industry. The banker had, on his behalf, obtained an insurance coverage from the 1st defendant- insurer. But when the plaintiff suffered the loss and looked up to the insurer, it turned out that the policy availed by the bank, Fire 'C' policy, covers only the fire, but not flood. However, if it were Fire 'A' policy it would have covered fire and flood. The insurer refuted the claim, leading to the suit from which the appeal arises.

3. Having regard to the nature of the contentions of the 1st defendant insurer, the banker was impleaded as additional defendant, at the instance of the plaintiff, as per order dated 29.05.92 in I.A.No.865/92. However, in its wisdom, the banker chose to remain ex-parte in the proceedings before the court below. The suit was ultimately dismissed holding that a Fire 'C' policy does not cover flood and the plaintiff is not entitled to that relief as against the insurer. However, the judgment appears to be eloquent regarding negligence of the banker in the matter of availing the appropriate policy. It was also noticed that if it had been a Fire 'A' policy, the plaintiff's claim would have sustained, as stated in paragraph 23 of the judgment which reads as follows:

> "Of course, it cannot be disputed that in case 2nd defendant insured the unit under A policy by applying for issuance of the same to first defendant, the plaintiff's claim would have sustained. Plaintiff who is also the co-insurer was bound to enquire about the nature of the policy taken by the mortgagee, the 2nd defendant, and to enquire about the quantum of insurance and scope of Insurance. At any rate the negligence of additional 2nd defendant bank looms large in having not applied for insuring the plaintiff's SSI unit under A policy. But this cannot fasten liability on additional 2nd defendant especially when plaintiff does not claim any relief against it."

4. The learned counsel for the appellant urges that in terms of the All India Fire Tariff, the insurer is obliged in law to issue a Fire 'A' policy when it insurers a small scale industry and that the said All India Fire Tariff has been held to be a piece of subordinate legislation by at least three different High Courts viz.Allahabad, Jammu & Kashmir and Karnataka. However, the learned counsel for the insurer urges that even going by the said All India Fire Tariff, any obligation of the insurer to issue a Fire 'A'policy would be only in a case where a Fire 'A' policy and Fire 'B' policy is applied for and such an instance would not emerge out of All India Fire Tariff in cases where the application is only for Fire 'C' policy. However, the impugned judgment does not reflect any consideration of the All India Fire Tariff. This is in spite of the fact that the plaintiff had applied before the court below to direct the insurer to produce the All India Fire Tariff, which application was dismissed as belated. But if that is a piece of subordinate legislation, it is not required to be produced as an item of evidence. It needs to be referred only as a part of the law of the land.

5. Along with the appeal, on appropriate legal advice, the plaintiff filed C.M.P.No.2609 of 1994 seeking leave to amend the plaint, thereby claiming relief against the banker-2nd defendant. That application for amendment is pending for consideration along with this appeal. However, I do not find any objections having been filed to that petition. Having regard to the facts and circumstances of the case, it is appropriate to give the plaintiff an opportunity to amend the plaint to seek relief against the 2nd defendant also. This is because if the 2nd defendant-banker had insisted on a policy being taken, it needs to be decided as to whether the bank was obliged to ensure that the appropriate policy was taken and if so whether it is liable for any inaction or negligence on its part.

6. Though the court below has stated its views regarding the negligence of additional 2nd defendant, I do not deem it appropriate to sustain those findings, particularly when the 2nd defendant remained ex-parte, may be due to the fact that no relief was claimed against the 2nd defendant as such. Such findings are vacated.

In the result:

(1) The impugned decree is set aside and the case remitted for reconsideration to the trial court. L.C.Rs shall be transmitted forthwith.

(2) C.M.P.No.2609 of 1994 is allowed.

(3) The parties will appear before the court below on the 6th day of February,2007.

(4) The plaintiff will carry out the amendments as per C.M.P No.2609 of 1994 on such day as may be permitted by the trial court after receipt of the L.C.Rs.

(5) After the amendment of plaint is carried out, the defendants will be granted opportunity to file further pleadings.

(6) All parties will be entitled to place further pleadings and adduce further evidence.

(7) The order of the stay of O.S.No.271/94 granted on 20.06.05 in that suit under Section 10 of the Code of Civil Procedure will continue until final disposal of the suit, following this remand order.

(8) Having regard to the peculiar circumstances of the case, it is directed that the full amount of court fee paid on the memorandum of appeal will be refunded to the appellant .

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

sj